

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Roamer One, Inc. and certain	)	
220 MHz Non-Nationwide Licensees	)	File Nos. B000672, B000673, B000674,
	)	B000678, B000680, B000688,
Applications for Modification	)	B000691, B000692, B000693,
Filed Electronically After May 1, 1996	)	B000695, B000697, B000699,
	)	B000700, B000701, B000702,
and	)	B000708, B000713, B000719,
	)	B000721, B000724, B000739,
Requests for Waiver of Section 90.755(a)	)	B000742, B000743, B000758,
of the Commission's Rules	)	B000760, B000762, B000768

**ORDER**

**Adopted: February 14, 2002**

**Released: February 21, 2002**

By the Commission:

**I. Introduction**

1. This Order addresses an application for review filed by Roamer One, Inc. ("Roamer One") on March 31, 2000.<sup>1</sup> Roamer One seeks Commission review of an action taken by the Wireless Telecommunications Bureau, Commercial Wireless Division ("Division") on March 1, 2000, which denied Roamer One's petition for reconsideration of the denial of the above-captioned waiver requests and the dismissal of the above-captioned applications.<sup>2</sup> For the reasons discussed below, we grant Roamer One's Application for Review.

<sup>1</sup> See Application for Review filed by Roamer One, Inc. on March 31, 2000 (Application for Review). Roamer indicates that the Application for Review is submitted on behalf of Roamer One and 27 individual licensees set forth on Exhibit A to the Application for Review. Roamer and the 27 individual licensees were the subject of the *Division Order* discussed herein. In Exhibit B of the Application for Review, Roamer attaches statements from each of the 27 individual licensees indicating that the licensees have reviewed the Application for Review and that the statements made therein are true and correct to the best of each licensee's knowledge and belief. To the extent that the 27 licensees are considered to be joining the Application for Review, we will consider the arguments of Roamer and the 27 licensees collectively in this order.

<sup>2</sup> In re: 220 MHz Licensees, Applications for Modification Filed Electronically after May 1, 1996 and Requests for Waiver of Section 90.755(a) of the Commission's Rules, *Order*, 15 FCC Rcd 4569 (WTB, Comm. Wir. Div.) (2000) (*Division Order*).

## II. Background

2. In January 1996, the Commission adopted a modification procedure in the 220 MHz *Second Report and Order* whereby incumbent, non-nationwide licensees in the 220 MHz service were able to relocate their authorized base stations within certain parameters.<sup>3</sup> Under this procedure, a licensee that submitted a letter by March 11, 1996, stating its intent to relocate, was required to file its modification application with the Wireless Telecommunications Bureau (Bureau) by May 1, 1996.<sup>4</sup> Applicants were permitted to file their modification applications manually or electronically.

3. Roamer One, a system manager of 220 MHz systems, contracted with an independent company, Pagers Plus, to prepare and file certain 220 MHz modification applications on behalf of licensees managed by Roamer One. On March 22, 1996, Pagers Plus began filing these applications with the Bureau electronically. Pagers Plus also electronically filed modification applications for licensees that were not managed by Roamer One.<sup>5</sup> Roamer One states that in late March 1996, Pagers Plus began to encounter problems with filing the modification applications electronically, including delays in transmitting the applications and dropping of applications during transmission.<sup>6</sup> In particular, Roamer One claims that the time it took Pagers Plus to submit applications increased from a few minutes per application when it began filing on March 22, 1996, to over two hours per application on May 1, 1996.<sup>7</sup>

4. Roamer One alleges that Pagers Plus failed to complete several filings prior to the midnight deadline on May 1, 1996,<sup>8</sup> due to the alleged problems of delay and drop-off in submitting the applications electronically.<sup>9</sup> After the May 1 deadline had passed, Pagers Plus continued to file

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<sup>3</sup> Amendment of Part 90 of the Commission's Rules to Provide for the Use of the 220-222 MHz Band by the Private Land Mobile Radio Service, PR Docket No. 89-552, Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, GN Docket No. 93-252, *Second Report and Order*, 11 FCC Rcd 3668 (1996) (220 MHz *Second Report and Order*).

<sup>4</sup> *Id.* at 3674, ¶ 22. A licensee seeking modification of its authorization to relocate its base station was required to file either a modification application or a letter certifying to the Commission its intent to file a modification application. *See* 47 C.F.R. § 90.755(b). If the licensee filed a letter of intent, it was then required to file the modification application by May 1, 1996. *See* 47 C.F.R. § 90.755(a).

<sup>5</sup> In the *Denial Letter*, the Land Mobile Branch indicated that Roamer One also filed modification applications independently of Pagers Plus. *Denial Letter* at 2, 3 nn.2, 3 & 5. Roamer One states, however, that it filed no applications directly. Roamer One surmises that this error occurred because Pagers Plus identified Roamer One as the contact representative on some of its submissions. *See* Roamer One Petition at 4, n.3.

<sup>6</sup> Roamer One Petition at 2. *See also* Attachments to Roamer One Waiver Request.

<sup>7</sup> Roamer One Petition at 2-3 (citing Roamer One Waiver Request at 3 and Attachments B and D).

<sup>8</sup> The May 1, 1996 filing deadline was set forth in section 90.755(a) of the Commission's rules, 47 C.F.R. § 90.755(a).

<sup>9</sup> Roamer One Petition at 2-4.

applications electronically during the next two days. Each of these submissions was accompanied by a request for waiver of the May 1, 1996 filing deadline, which cited the filing delays allegedly caused by the Commission's computer problems. Roamer One states that, prior to the filing deadline, Commission data processing center staff had recommended to Pagers Plus that if it was unable to complete filing its applications by the filing deadline, it should continue to file late applications accompanied by a waiver request.<sup>10</sup>

5. On August 21, 1996, Roamer One filed a letter in support of the individual licensee waiver requests.<sup>11</sup> Roamer One stated that it was filing its letter on behalf of certain licensees for which Pagers Plus had filed 111 modification applications,<sup>12</sup> and that it had management agreements with each of these licensees.<sup>13</sup> Roamer One asserted that problems with the Bureau's electronic filing system had prevented Pagers Plus from filing all the applications by the deadline and that these problems were beyond the control of Pagers Plus.<sup>14</sup> Roamer One characterized the difficulties that Pagers Plus encountered with the electronic filing system as unforeseen, widespread, and equally experienced by all persons who filed electronically.<sup>15</sup>

6. On April 9, 1997, the Bureau's former Land Mobile Branch ("Branch") issued its *Denial Letter* and dismissed the applications.<sup>16</sup> The Branch found that the problems Pagers Plus encountered in filing applications were not unforeseeable, widespread, or beyond its control.<sup>17</sup> In particular, the Branch noted that because Pagers Plus had experienced problems as early as March 26, 1996, more than thirty days prior to the deadline, Pagers Plus could have foreseen that it might incur additional problems filing electronically as the deadline approached. The Branch also concluded that the problems were not widespread because Pagers Plus was the only one of the four entities filing electronic applications that reported problems to the Commission. Moreover, the Branch indicated that both Pagers Plus and Roamer One could have timely filed applications manually at the Commission's lockbox facility.<sup>18</sup> The Branch found that the grant of a waiver was not justified and concluded that each party had failed to act with due diligence and had not presented unique circumstances.<sup>19</sup> The Branch dismissed as untimely the

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<sup>10</sup> *Id.*

<sup>11</sup> Roamer One Waiver Request.

<sup>12</sup> *Id.* at 1. *See also id.*, Attachment A (listing applications).

<sup>13</sup> *Id.* at 1.

<sup>14</sup> *Id.* at 4.

<sup>15</sup> *Id.*

<sup>16</sup> Since the petitions and waiver requests were filed, the Land Mobile Branch of the Licensing Division of the Wireless Telecommunications Bureau was reorganized as the Licensing and Technical Analysis Branch of the Commercial Wireless Division of the Wireless Telecommunications Bureau.

<sup>17</sup> *Denial Letter* at 2-3.

<sup>18</sup> *Id.*

modification applications filed after May 1, 1996.<sup>20</sup>

7. On May 9, 1997, Roamer One and Pagers Plus filed petitions for reconsideration of the *Denial Letter*. On March 1, 2000, the Division issued the *Division Order* dismissing the petitions for reconsideration filed by Roamer One and Pagers Plus, and upholding the dismissal of the applications for modification and denial of the waiver requests. In the *Division Order*, the Division determined that neither Pagers Plus nor Roamer One timely filed their applications by the May 1, 1996 deadline and found that the applications could have been manually filed in a timely manner. On March 31, 2000, Roamer One filed its application for review.<sup>21</sup>

### III. Discussion

8. The Commission has repeatedly stated that strict adherence to filing deadlines is required to permit the Commission to begin processing a defined group of applications at a specific time without the specter of facing numerous waiver requests.<sup>22</sup> However, while we believe the earlier decisions of the Branch and the Division in this matter were consistent with existing Commission procedures, including adherence to strict filing deadlines, we conclude that there are unique circumstances in this case warranting the grant of a waiver.

9. Based on our review of the record, we find that the transmission delays incurred in filing the modification applications may have been caused at least in part by the Bureau's electronic filing system, which the Commission encouraged licensees to use and, at that time, was a recently introduced system.<sup>23</sup> While some of the technical difficulties described by Roamer One may have been caused by the applicant, the record suggests that there were also technical problems associated with the Bureau's electronic filing system that may have impeded electronic filing. For example, Commission staff performed system maintenance and upgrades during the filing period, which appears to have contributed to transmission delays in the filing of applications.

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<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> The Commission's records do not reflect that Pagers Plus filed an Application for Review of the *Division Order*.

<sup>22</sup> See Public Notice, "FCC Overrules *Caldwell Television Associates, Ltd.*," 58 Rad. Reg. 2d (P&F) 1706 (1985) (1985 Public Notice). See also First Auction of Interactive Video and Data Service (IVDS) Licenses, *Memorandum Opinion and Order*, 11 FCC Rcd 1134 (1996) ("[t]his strict standard is necessary to ensure that applicants are treated fairly and equally ..."). See also Mary R. Kurpis and WLOS TV, Inc., *Memorandum Opinion and Order*, 5 FCC Rcd 5142 (1990) ("Although we understand that difficulties are sometimes encountered by parties trying to meet those deadlines, a strict policy as to the official close of business avoids confusion, establishes consistency and treats fairly all parties that are similarly situated.")

<sup>23</sup> See In the Matter of Implementation of Section 6002(B) of the Omnibus Budget Reconciliation Act of 1993, *Second Report*, 12 FCC Rcd 11266, 11328 (1997). The system used for electronic filing of these applications was subsequently replaced by the Wireless Telecommunications Bureau's Universal Licensing System, which offers more advanced and reliable electronic filing capability.

10. Because the Commission appears to be at least partially responsible for technical difficulties associated with the filing of applications in this case, we find this case distinguishable from those in which the late filing was due to problems which were either entirely under the applicant's control (*i.e.*, failure of applicant's computer system, facsimile machine, or copy machine) or were reasonably foreseeable (*i.e.*, weather, traffic).<sup>24</sup> There is also precedent for granting limited waivers in situations similar to the present case where filers experienced problems with electronic filing, but initiated the filing in a timely manner, showed reasonable diligence when technical difficulties occurred, and were able to file very shortly after the deadline.<sup>25</sup>

11. We find that Pagers Plus acted with reasonable diligence by keeping in constant contact with the Commission's staff in an attempt to resolve the on-going problems with the electronic filing system. Although we have consistently held that oral statements made by Commission staff are not binding,<sup>26</sup> we also note that the staff recommended that Pagers Plus continue to file applications, accompanied by requests for waiver, for the immediate period following the deadline. Finally, we note that Pagers Plus completed all filings within two days following the close of the applicable window, and that the late-filed applications had no impact on the overall processing of 220 MHz modification applications. Thus, the situation presented here is distinguishable from that presented by short-form applications submitted in anticipation of an auction, where a late-filed application could delay the entire auction. Also, because the filing window created by the *220 MHz Second Report and Order* was the only opportunity afforded 220 MHz licensees to modify existing Phase I licenses, we recognize the severe hardship that would result in denying these modification applications.

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<sup>24</sup> See *1985 Public Notice* at 1707 ("The Commission will no longer consider as unusual or compelling ... requests for waiver based upon claims that copying machines, delivery services or even, in most cases, inclement weather or illness, was responsible for the tardy filing.") See also *Green County Mobilephone, Inc. v. FCC*, 765 F.2d 235 (D.C. Cir. 1985) (rejecting the Commission's distinction between the last minute failure of a copy machine and the delay of a courier's airplane due to dense fog), *Mary R. Kurpis and WLOS TV, Inc., Memorandum Opinion and Order*, 5 FCC Rcd 5142, (1990) (applicants attributing the tardiness to computer error is not grounds for a waiver) and *Pacific Broadcasting Corp., Memorandum Opinion and Order*, 68 FCC Rcd 845 (1978) ("Parties waiting until the last day to effect delivery of pleadings from out-of-town by common carrier run a considerable risk that unforeseen delay will render their pleadings untimely").

<sup>25</sup> See, e.g., *McLeod USA, Inc.*, 14 FCC Rcd 17659 (WTB, PSPWD 1999) (waiver granted to LMDS applicant that was unable to file long-form application electronically due to technical difficulties); *Metricom, Inc.*, 12 FCC Rcd 15157 (WTB, Comm. Wir. Div. 1997) (Commission granted waiver request after long-form applicant experienced technical difficulties, stating "[w]hile we have no reason to believe the Commission was responsible for these technical difficulties, we do not believe Metricom should be penalized for what appears to have been a good faith effort to complete its filing electronically"); *Mountain Solutions, Ltd.*, 14 FCC Rcd 4020 (WTB, Comm. Wir. Div. 1999) (waiver of long-form filing deadline granted because late filing involved de minimis amount of time and applicant was actively engaged in submitting its applications at the filing deadline).

<sup>26</sup> Statements by individual members of the Commission staff are not binding on the Commission, as the Commission has specifically held that parties who rely on staff advice or interpretations do so at their own risk. See *In the Matter of the Applications of Hinton Telephone Company*, 10 FCC Rcd 11625, 11637; see also *AAT Electronics Corp.*, 53 RR 2d 1241, 1225-26 (1983), *aff'd*, *P & R Temmer v. FCC*, 743 F.2d 918, 931 (D.C. Cir. 1984).

#### IV. Ordering Clauses

12. Accordingly, IT IS ORDERED, pursuant to section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), and section 1.115 of the Commission's rules, 47 C.F.R. § 1.115, that the application for review filed by Roamer One, Inc. on March 31, 2000, IS HEREBY GRANTED.

13. IT IS FURTHER ORDERED that, pursuant to sections 4(i) and 309 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 309, and section 1.947 of the Commission's rules, 47 C.F.R. § 1.947, the above-captioned applications are HEREBY REINSTATED to pending status for further processing by the Commercial Wireless Division, Licensing and Technical Analysis Branch, in accordance with Commission rules and regulations.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton  
Acting Secretary